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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 308

THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I. Statement Opposing Jurisdiction

In compliance with Rule 12 of the Rule of the Supreme Court of the United States, as amended, Appellee, Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey presents this, its statement against the jurisdiction of this court to entertain a review upon appeal of the judgment under question.

A. Is there Statutory Grounds for Appeal?

The Appellant relies upon 28 U. S. C. A. 1257 (2) for the grounds for appeal. There was no decision by

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the highest court of the State in favor of the validity of any statute.

The decision of the highest court of the State found it unnecesary to determine the constitutionality of any statute or of the order under review by it since the Appellant "* * * has failed to prove a loss in its entire business or in its operation of train 613." (Appellant's Appendix A, page 23).

In substance what the court determined was that because of lack of proof in particulars pointed out by the court the constitutional validity of the Board's Order was not in issue and need not be determined.

In these respects the instant case differs from *King* vs. *City Council of Augusta* 277 U. S. 100, 48 Sup. Ct. 489 (1928) and cases following that decision.

For these reasons this court should decline to take jurisdiction in this cause.

B. Is There a Federal Question?

A consideration of all the record, the decision of the Supreme Court of New Jersey in 12 N. J. 281 (1953) and the decision of the Appellate Division, Superior Court of New Jersey in 23 N. J. Super. 43 (A. D. 1953) will show that this was a proceeding under R. S. 48:3-3 N. J. S. A. "No public utility shall provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which reasonably can be demanded or furnished when ordered by the board".

The Board ordered the Railroad to continue the operation of Train No. 613, after notice and hearing. This order was based on public convenience and necessity or as set out in R. S. 48:3-3 N. J. S. A. a reasonable demand for the service. The Board held "that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for discontinuance of a service". (Appellant's Appendix C, page 41.)

The order of the Board was upheld by the Supreme Court of New Jersey, 12 N. J. 281 (1953), (Appellant's Appendix A) and by the Appellate Division, Superior

Court of New Jersey, 11 N. J. 43 (AD 1953), (Appellant's Appendix B).

In indicating that the Appellant did not sustain the burden of proof the Supreme Court of New Jersey said, "* * * the railroad has failed to prove a loss in its entire business or in its operation of train 613." (Appellant's Appendix A, page 23.) "In a situation such as this where the public utility is an 80%-owned subsidiary of the parent company it is incumbent upon the subsidiary to prove the reasonableness of its expenditures and the accuracy of its accounts. This is especially true where there is extensive intermingling of employees and where the subsidiary is to a large extent dependent upon the parent for rental of its equipment. Inasmuch as the railroad's operating loss, both as to its entire system and as to the particular train in question, is a factor to be considered by the board, the railroad has the duty to present proof of the propriety of its expenditures and to establish that its operating deficiency is *bona fide.*" (Appellant's Appendix A, page 23, 24.)

Therefore, no substantial federal question is in issue.

II. Motion to Dismiss or Affirm

Comes, now, the Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey, the Appellee herein, by Frank H. Sommer, its Counsel, and moves this court to dismiss with costs the appeal herein to this court by the New Jersey and New York Railroad Company (Peter Duryee, Trustee) upon the following grounds:

A. The assignment of error filed herein does not draw in question the validity of any express state statute of the State of New Jersey on the ground of its being repugnant to the constitution, treaties or laws of the United States, and no decision herein of the

Supreme Court of New Jersey passed on that question. Therefore an appeal under 28 U. S. C. A. 1257 (2) should not be allowed.

B. Furthermore, neither the Board, or courts of New Jersey passed on any construction of Section 77, Bankruptcy Act, 11 U. S. C. A. 205 (c). They only found that from the evidence that the Railroad was a subsidiary or part of the system of the Erie Railroad and that additional evidence as to the reasonableness of the costs of the Railroad should have been produced. Therefore, a writ of certiorari under 28 U. S. C. A. 1257 (3) should not be allowed.

In the alternative, Appellee moves this court to affirm the judgment from which in the above-entitled causes purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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